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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, ET AL., PETITIONERS

v.

ARKANSAS POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 41–43) is reported in 60 F. Supp. 907. The opinion of the United States Court of Appeals for the District of Columbia (R. 46–69), is reported in 156 F. 2d 821. The Federal Power Commission has issued no opinion and no final order.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1946 (R. 70). The petition for a writ of certiorari was filed on September

27, 1946, and granted on October 28, 1946. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Federal Power Commission has under consideration, in a proceeding pending before it, questions concerning the reclassification and adjustment of the accounts of an admitted "licensee" and "public utility" and concerning the scope of its powers in such a proceeding, and has set a date for public hearing thereon. A state regulatory agency has entered an order prescribing accounting entries to be made in the company's general corporate and fundamental books of account.

The question is whether a United States district court may determine by declaratory judgment, in advance of the Commission's hearing and before it can be known if that issue has even to be decided or what its precise posture will be, whether the Federal Power Commission or the state agency has exclusive authority to fix the amounts to be recorded in such general corporate and fundamental books of account.

STATUTES INVOLVED

The Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U. S. C. 791, *et seq.*) is printed in a separate pamphlet filed with this brief. The relevant portions of the Arkansas Utility Act (Act 324 of

1935) are set forth in Appendix A, *infra*, pp. 49–51. The Declaratory Judgment Act is printed as Appendix B, *infra*, p. 52.

STATEMENT

The question comes before this Court on certiorari to review a judgment of the United States Court of Appeals for the District of Columbia which reversed a district court judgment dismissing the complaint for want of jurisdiction.

Administrative Proceedings. The respondent, Arkansas Power & Light Company, a subsidiary of the Electric Bond & Share Company system (Ex. 5, p. 4),[1] is a "licensee" (Ex. 8, Appendix C, *infra*, p. 70) under the Federal Power Act and a "public utility" (R. 5, 7) under both that Act (pamphlet copy, pp. 26–27) and the Arkansas Utility Act (Appendix A, *infra*, p. 49), and subject to the Federal Power Commission's Uniform System of Accounts (Ex. 4, pp. v., 1, 3, 5, 6). In compliance with Electric Plant Accounts Instruction 2–D of that system of accounts (Ex. 4, p. 38) and a general order by the Commission dated May 11, 1937, with respect thereto, the respondent on June 3, 1940, filed with the Federal Power Commission ("Commission") a proposed reclassification of its accounts (R. 9,

[1] There are nine exhibits to the complaint, referred to herein as "Ex. —." The complaint is printed, R. 2–22. Exs. 7, 8, and 9 to the complaint, and relevant portions of Ex. 2, are printed as Appendix C, *infra*, pp. 53–83; the other exhibits are not printed, but are part of the transcript of the record on file with this Court.

26; Ex. 6, p. 1). The Commission staff made a field examination and audit of this proposal and prepared a report which raised questions concerning some of the accounting entries proposed by the respondent (R. 9, 26; Ex. 5). This report was served on the respondent by a Commission order of June 15, 1943,[2] which directed respondent to show cause why it should not make the adjustments proposed by the staff and submit a revised reclassification of its accounts (R. 27; Ex. 6, p. 1). A response thereto was filed by the respondent (R. 27; Ex. 7, Appendix C, *infra*, p. 66).

Thereafter, the Department of Public Utilities of the State of Arkansas ("Department") initiated a rate and accounting proceeding against respondent and, after hearing, on June 24, 1944, issued an order fixing rates and requiring respondent to reclassify its accounts (R. 6; Ex. 2).[3]

To avoid interference with the Department's rate proceedings, the Commission deferred its own hearing (R. 27; Ex. 7. Appendix C, *infra*, p. 66). After the Department's proceeding was completed, the Commission's staff, which had con-

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[2] 3 F. P. C. 1018. By this order the Commission instituted a proceeding against respondent, *In the Matter of Arkansas Power & Light Company*, Docket No. IT-5829.

[3] That order was affirmed by the Circuit Court of Pulaski County, Arkansas (R. 7; Ex. 3). It does not appear that any question was raised as to any effect of the Federal Power Act, or of any requirements prescribed thereunder; or that any further review was sought of the decision of the Circuit Court of Pulaski County.

tinued its investigation, raised further questions in a supplemental report concerning the respondent's proposed reclassification of accounts (R. 9–10; Ex. 6), and the Commission, on September 27, 1944, served that supplemental report on the respondent and required it to show cause why the proposed reclassification should not be adjusted to conform to the staff's supplemental recommendations (R. 10–11; Ex. 7, Appendix C, *infra*, pp. 65–69).[4]

The respondent filed a response to this order

[4] The accounting matters of principal importance before both agencies relate to the classification and adjustment of "write-ups" in Account 107, Electric Plant Adjustments (Ex. 1, pp. 25–26; Ex. 4, p. 19) and other excesses over original cost in Account 100.5, Electric Plant Acquisition Adjustments (Ex. 1, p. 25; Ex. 4, p. 19) and Account 108.15, Common Utility Plant Acquisition Adjustments, a sub-account of Account 108, Other Utility Plant (See Ex. 7, Appendix C, *infra*, p. 67, n. 1; Ex. 4, p. 20). The classifications and adjustments ordered by the Department appear in its order of June 24, 1944 (Ex. 2, Appendix C, *infra*, pp. 55–57); the relevant proposals of the company questioned in the show cause orders of the Commission are referred to in Ex. 7, Appendix C, *infra*, pp. 65–68, paragraphs (a), (b), (h), (i), (j), and (B). The largest differences between the Department's order and the Commission's staff recommendations consist of excesses over original cost (according to the staff) which the Department's order classifies and permits to remain in Accounts 100.5 and 108 (*infra*, p. 55). The Commission's staff report questions whether some of those amounts should not be classified in Account 107 and some in Account 108.15, and the Commission requested submission of a plan for disposition of all amounts classified in those accounts.

having first on November 22, 1944, petitioned the Commission to dismiss the proceedings initiated by its show cause orders of June 15, 1943, and September 27, 1944 (Ex. 8, Appendix C, *infra*, pp. 69–81).[6] By that petition it alleged that the Department had reclassified respondent's accounts and directed the entries and adjustments to be made in respondent's accounts and that respondent had complied with those directions (*infra*, pp. 70–71). Respondent also alleged that the entries and adjustments recommended by the Commission's staff differed from those respondent had made under the directions of the Department (*infra*, pp. 73–76). It further alleged that there are statutory penalties for violation of the directions of the Department and that the "primary, fundamental and dominant books of account kept by the respondent are subject to the jurisdiction and supervision of the Arkansas Department * * * [and] therefore this Commission cannot lawfully exercise the power asserted or attempted to be exercised pursuant to its said show-cause orders" (Ex. 8, Appendix C, *infra*, pp. 77–78). It asked, *inter alia*, that the proceedings initiated by the show-cause orders be dismissed, and "that the issues and matters raised by this motion [i. e., petition] be set for an early hearing and for oral argument before the Commission en banc * * *" (*infra*, p. 80).

[6] The filing date is not shown, but appears on the original in the Commission's files.

On January 2, 1945, the Commission, finding it "appropriate to carry out the provisions of the Federal Power Act," ordered that a hearing be held, beginning on February 20, 1945, "respecting the matters involved and the issues arising out of the proceedings in this matter." The order recited what those proceedings had been, and expressly included respondent's petition to dismiss. (Ex. 9, Appendix C, *infra*, pp. 82–83.)[6]

District Court Proceedings.—Three weeks later, and before the date set for the hearing, respondent filed the instant complaint in the district court against the Commission, the Department, and the members of each in their official capacities (R. 2–22).[7] In this complaint respondent made substantially the same allegations it had in its petition to the Commission, adding that the Commission "failed to act upon said petition as requested," and by its orders setting a hearing "has assumed the jurisdiction and power to consider, determine, and decide all of the issues raised"

[6] An erroneous reference in the order of January 2, 1945, to a motion filed November 20, 1944, and withdrawn when the petition was filed on November 22, 1944, was corrected by an order of January 9, 1945, printed as Appendix D, *infra*, p. 84.

[7] The complaint named as defendants, among others, Basil Manly and John W. Scott, as Commissioners. They have since resigned, and their successors have not been substituted as defendants. The Arkansas Department, which was not a party on appeal, has been succeeded by the Arkansas Public Service Commission. Act 40, Acts of the General Assembly of Arkansas, approved February 12, 1945.

by its show cause orders (R. 17). The complaint prayed for an injunction against the Commission[*] and for a declaratory judgment that the Department had jurisdiction over the respondent's "primary, dominant and principal books of accounts" to the exclusion of the Commission or that "in the event it should be held that the Commission * * * [has] exclusive jurisdiction * * * [that] the action of the Department * * * [is] void and of no force and effect" (R. 20–22).

The Department voluntarily appeared in the district court and filed an answer and cross-claim (R. 23). It denied that its order was void (R. 23–24), and, asserting that the Commission could not constitutionally be vested with such jurisdiction (R. 29–30), requested the court to declare that the Department had exclusive jurisdiction over the respondent's official corporate records and accounts (R. 32–33).

The Commission moved to dismiss the complaint and the cross-claim on two grounds: first, that the court did not have jurisdiction over the subject matter; second, that no claim was stated upon which relief could be granted (R. 40–41). The motion

[*] The prayer for injunction has not been pressed by the company in the lower courts. The Commission's records show that its hearing was postponed by order of February 8, 1945, on respondent's petition, and thereafter from time to time until November 23, 1945, when it was postponed "to a date to be hereafter fixed by order of the Commission," and that no such order has been entered.

was granted by the district court. It held that Section 313 (b) of the Act (pamphlet copy, pp. 47–48) provides an exclusive method of judicial review and that the Federal Declaratory Judgment Act (Appendix B, *infra*, p. 52) does not confer upon the court jurisdiction which it does not otherwise possess (R. 42–43). The district court also pointed out that the administrative remedies had not been exhausted (R. 43). Finally it added that the substantive question raised in the complaint and the cross-complaint appeared to have been settled against the contentions of the complaint and the cross complaint (R. 43).

The Lower Court's Decision.—On appeal by respondent, the Court of Appeals (Judge Morris dissenting) reversed the dismissal, holding that the "complaint exhibited a justiciable controversy properly cognizable under the Declaratory Judgment Act" (R. 47). Basing its argument on the premise "that a public utility cannot keep more than one set of actual, official corporate accounts" (R. 48), "since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures" (R. 49), the court concluded that there was an actual controversy: a conflict between the Department and the Commission "each commission * * * claiming, to the exclusion of the other, the power to dictate and supervise official books of accounts" (R. 49. See R. 55, 59.) Such a claim by the Department it found in the Department's order of June

24, 1944 (Ex. 2, Appendix C, *infra*, pp. 53–65), which according to the court, "had definitely claimed exclusive jurisdiction" (R. 51, 59). The claim by the Commission it found as follows (R. 59):

> In view of the nature of the report and recommendations made to the federal commission by its own representatives, in view of its consistent adherence to the original cost standard, in view of the unmistakable tenor of its [show cause] order * * *, and because of its affirmative pleading, and its argument here, it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

Accordingly the court held that "the District Court should set aside its order dismissing the complaint * * *."[9]

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[9] The opinion adds: "then deny the motion to dismiss and proceed to determine the controversy. While the state commission did not appeal from the order dismissing its cross-claim, probably the District Court on its own motion will set aside that order also" (R. 63).

Although the Department did not appeal, the Attorney General of the State of Arkansas appeared as *amicus curiae*, as he had in the district court, in support of the respondent's position. After the dismissal by the district court, both the Department and the State intervened in the proceedings before the Commission. See the Commission's orders of September 27, 1945.

In directing denial of the motion to dismiss (R. 63, 70) the court disregarded the presence of the second, alternative

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that the district court has jurisdiction to entertain a suit for a declaratory judgment upon the facts alleged in the complaint.

2. In holding that the district court has the power, in the circumstances of this case, to determine by declaratory judgment whether the Commission or the Department has exclusive jurisdiction over the respondent's fundamental corporate books and accounts.

3. In holding that the allegations of the complaint present an "actual controversy" within the meaning of the Federal Declaratory Judgment Act.

4. In holding that the respondent and the Department or either of them is not required to exhaust administrative remedies before seeking judicial relief.

5. In failing to hold that the district court is without authority to interfere with or limit the scope of the Commission's jurisdiction and authority respecting the matters which are the

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ground in the motion to dismiss, i. e., that "no claim is stated upon which relief can be granted" (R. 40), a ground of decision relied upon by the district court (R. 43) but which the Court of Appeals refused to take seriously (R. 62–63). If the court's decision on the jurisdictional question were to be affirmed by this Court, this direction should be corrected to permit the district court to reconsider the second ground.

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subject of the pending proceeding before the Commission.

6. In failing to hold that the sole right to judicial review accorded the respondent and the Department with respect to the matters complained of is the review provided by Section 313 (b) of the Federal Power Act.

7. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The decision of the court below permitting respondent to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the administrative body must necessarily pass is contrary to the established doctrine that parties may not seek judicial relief before administrative remedies are exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, are in point and controlling. The exhaustion principle applies to prayers for declaratory relief as well as to suits for injunctions. It applies to questions of law as well as matters of administrative discretion—although it is to be noted that in the present case the decision of the Commission may rest upon testimony as to technical accounting matters as much as upon legal conclusions. The fact that

there is no final administrative order does not justify the failure to exhaust administrative remedies but on the contrary makes it even more clear that the instant suit is premature. Nor does the fact that the present dispute involves the interrelationship between Federal and State statutes warrant disregard of the exhaustion doctrine. In the first place, until the Federal Power Commission renders its decision, the nature and extent of such a conflict, if there be any, will not be known. Secondly, when Congress is exercising its paramount commerce power the procedure which it establishes is as binding upon the states as on private persons. See *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946. The assumption of the court below that the Commission would assert exclusive jurisdiction in conflict with that of the State is both unfounded at this stage of the proceeding and not [illegible] for avoiding the exhaustion doctrine.

II

Inasmuch as the impact of the Commission's accounting authority is at the present time contingent, speculative, and conjectural, there is no actual controversy cognizable under the Declaratory Judgment Act. The Commission has not claimed any exclusive power over respond-

ent's accounts. At most it has merely asserted that it may prescribe accounting requirements irrespective of state law. Nor does the Arkansas statute nor the Department's order in this case contain any language of exclusion. Clearly in the present posture of the proceeding before the Commission any controversy between the two governmental agencies is hypothetical and conjectural and not ripe for judicial determination. The courts will be reluctant to anticipate a conflict between State and Federal governments in the absence of a clear controversy.

ARGUMENT

Introduction

Although this case, in our view, involves an elementary application of the doctrine of exhaustion of administrative remedies, a preliminary clarification of the issues seems advisable.

The respondent is a public utility subject to both the Federal Power Act and the Arkansas Utility Act. Section 301 (a) of the Federal Act (pamphlet copy, p. 37) authorizes the Federal Power Commission to prescribe a system of accounts and requires utilities to keep such accounts as the Commission may prescribe; it further provides

> that nothing in this Act shall relieve any public utility from keeping any accounts,

> memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State.

The Arkansas statute also requires a utility to keep accounts as prescribed by the State regulatory agency. Neither statute provides that if a utility keeps the prescribed accounts it may not also keep different accounts if another sovereign so orders.

The respondent and the court below speak of the "primary", "dominant", "principal", or "official" accounts (R. 21, 48–51), and assume that each statute applies to these; from this they conclude that the two statutes are mutually exclusive. Respondent alleges that the Federal accounting requirements may not constitutionally be applied to it under the Commerce Clause because most, though not all, of its business is intrastate (R. 9),[10] and that, in any event, if the State's accounting requirements are made exclusive by State law, the proviso in Section 301 (a) quoted above "withhold[s] from the Federal Commission" all power to require the maintenance of different records for federal purposes (Brief in Opposition, p. 14).

The Federal Commission has in other cases assumed that its authority over accounting can not be limited by state action, and this Court has held it correct as to this. *Northwestern Electric Co.* v.

[10] This contention is not referred to by the court below or in respondent's brief in opposition.

Feleral Power Commission, 321 U. S. 119.[11] But the Commission has not held that a utility complying with its orders may not also keep other accounts required by state laws. Although, in a case in which the state had approved the federal requirements, the Commission has stated that its orders relate to the fundamental corporate accounts,[12] it has not expressly passed upon the question in relation to conflicting state rules.

[11] In the *Northwestern* case the company, another subsidiary of the Electric Bond & Share system, had argued that "the law of the State of Washington shall control the fundamental corporate books of account of Northwestern" and not "the Federal Power Commission system of accounts." (Petitioner's Reply Brief, No. 195, October Term, 1943, p. 25.) In rejecting this contention this Court stated (321 U. S. at 125):

"• • • We are not here concerned with what the regulatory authorities of Oregon or Washington may or may not demand or permit. Whatever that action may be, it is subordinate to Congress' appropriate exercise of the commerce power. The Commission's order does not purport presently to affect or constrain action by the states within their fields."

[12] *In the Matter of Northern States Power Company*, F. P. C. Opinion No. 138, July 3, 1946, relied upon by respondent (Br. in Opp., p. 12), was a case in which the proposed accounting adjustments approved and directed by the Commission had been approved by the Public Service Commission of North Dakota, the only state commission involved, and hence no problem of conflict with state requirements could have been presented. In submitting its proposal the Company had incorporated a reservation which might indicate that it intended to retain the right to maintain its fundamental corporate accounts in a different manner in the future. The Commission opinion made clear that the entries effectuating compliance with its orders must be made on the company's fundamental books of account without reservation. Otherwise they would be mere scraps of paper.

The Commission's order to show cause brought before it for a hearing the substantive propriety and validity of the proposals of its staff as to respondent's accounts. Respondent's petition to set aside these orders (R. 17; Exhibit 8, Appendix C, *infra,* pp. 69–81), brought before the Commission respondent's contention that it lacked power over respondent's accounts for the reasons mentioned. Both the order and the petition have been set for hearing before the Commission (Exs. 7, 9, Appendix C, *infra,* pp. 65–69, 82–83), a hearing which has been postponed for almost two years. The issues thus set for consideration by the Commission included the following interdependent questions: (1) Whether the Commission should order any accounting reclassifications or adjustments, as recommended by the staff of the Commission, differing from those ordered by the Department; (2) Whether the Commission should order any such different reclassificaions and adjustments to be recorded on respondent's fundamental corporate accounts; (3) Whether, if disparate sets of entries are ordered by the Commission and the Department on respondent's fundamental corporate accounts, they can, in fact, both be so recorded; if not, whether the Commission's power to issue such an order is excluded, affected or constrained by the Department's order. These questions may largely depend for their answer upon accounting technicalities and upon a consideration of the

relation of the questions to the purposes of the accounting provisions of the Federal Power Act."

The court below confused the question as to the Commission's power to prescribe accounts irrespective of state law with the question of the exclusiveness of the accounting requirements to be imposed by the Commission. The excerpts from the Commission's motion to dismiss (R. 40, 56–57) and its supporting brief below, as well as the prior decisions of the Commission, its staff recommendations, and the "unmistakable tenor" of the Commission's supplementary show cause order, upon all of which the court relied (R. 59) to show that the Commission had already made up its mind, relate at most to the former question. The court also assumed, as self-evident, that there "can be * * * only one set of figures" (R. 48–49) to truly reflect a company's operations and financial condition—an assumption which wholly disregards the variety of purposes for which the "figures" are to be used. See Kripke, *Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation*, 50 Yale L. J. 1180, 1197 *et seq.*

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[19] These include not only the facilitating of the administration of the dividend (Sec. 305 (a)), merger (Sec. 203), security issue (Sec. 204) and rate (Secs. 205, 206) provisions of the Act (pamphlet copy, pp. 29–34, 40) but also the accomplishment of the independent objective of regulation "by the informatory process" (cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 436–438) which loomed large in the legislative history of the Act (*infra*, p. 26, n. 20).

I

RESPONDENT WAS NOT ENTITLED TO A JUDICIAL DETERMINATION PRIOR TO THE EXHAUSTION OF ITS ADMINISTRATIVE REMEDIES

In this case, as in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, a party is seeking to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the administrative body must necessarily pass. The decision of the court below here, even more plainly than its recent decision in the *Waterman* case (151 F. 2d 292), reversed at the last Term, is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[18] Under a statute such as that here involved the rule rests not only on the principle of "judicial administration," but upon the specific statutory scheme providing for an administrative determination of all matters in the first instance, prior to judicial review. The doctrine enunciated in the *Myers* case and strongly reaffirmed in the *Waterman* case clearly applies here and bars jurisdiction to render a declaratory judgment.

None of the arguments advanced by respondent or the court below justifies a refusal to follow

[18] *Myers* case, 303 U. S. at pp. 50–51.

the established doctrine and the *Myers* and *Waterman* cases.[14]

A. *The Exhaustion Principle Applies to Prayers for Declaratory Relief.*—Although respondent's complaint sought both an injunction and a declaratory judgment, the prayer for injunctive relief has not been pressed (*supra*, p. 8, n. 8). The opinion below, relying on Borchard, *Declaratory Judgments*, emphasizes the fact that the suit is one under the Declaratory Judgment Act (R. 60–62).

But the *Waterman* case also involved a prayer for declaratory relief; indeed the opinion of the Court of Appeals in that case also relied on Borchard (see 151 F. 2d at 298). This Court summarily rejected the contention that the exhaustion doctrine was not applicable to declaratory judgment cases, saying (327 U. S. at 545 n.): "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299; *Coffman* v. *Breeze Corporation*, 323 U. S. 316; *Alabama State Federation of Labor* v.

[14] Before the decision of the court below in the *Waterman* case (151 F. 2d 292) had been reversed by this Court, respondent relied on that case for the proposition that "a determination of the existence or lack of jurisdiction of an administrative agency over a particular subject matter which depended solely upon the construction of a statute was fundamental and jurisdictional and that the solution of the issue is a judicial function and not an administrative one." Brief for Appellant in Court of Appeals, p. 22.

McAdory, 325 U. S. 450; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494, 499." Clearly the considerations of policy upon which the exhaustion doctrine rests would be frustrated if this were not the case. It is to be noted that in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 46, and the companion case of *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 56, the plaintiffs were praying for declaratory relief as well as for injunctions. In an earlier case under the National Labor Relations Act (*Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559), it was specifically stated that a court may not, by declaration, "stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin".[15]

B. *The Nature of the Question Here Sought to be Presented is Insufficient to Make the Exhaustion Rule Inapplicable.*—The court below held the exhaustion rule inapplicable because the present case does not involve the propriety of "accounting practices" or "bookkeeping entries," but only the "purely legal problem" of determining who

[15] The *Bradley Lumber* case, together with *Petroleum Exploration Co.* v. *Public Service Commission*, 304 U. S. 209, 221–222, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52 (both of which cite the *Bradley* case with approval), sufficiently answer the allegations in the complaint (R. 18, cf. R. 32) that the expense of the administrative proceeding justifies respondent in not exhausting its administrative remedy.

should have exclusive control of the accounting records of the respondent (R. 55).

The problem here presented is not a "purely legal problem." If the administrative proceedings are permitted to be completed, the assumed "conflict" between the Department and the Commission may never materialize. Not only should the appearance of the Department in the Commission proceedings (*supra*, p. 10, n. 9) aid in finding means of accomplishing the purposes of both agencies, but even if the Commission requires respondent to make accounting entries and adjustments differing from those ordered by the Department, as the court assumed it would, technical accounting testimony may show that the disparate entries required by the respective agencies can nevertheless both be recorded on respondent's fundamental corporate accounts (*supra*, pp. 17–18). Thus the present question may well prove academic.[16] Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508–509.[17]

In any event, "legal problems" are not immune

[16] Insofar as the constitutional question of supersedure may be involved, there would be further reason for avoiding the question. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470; cf. *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946.

[17] It should be noted that in that case the district court had jurisdiction independently of any power to pass on the question of coverage. *A fortiorari*, that case excludes the exercise of jurisdiction in a court action brought solely to take over the determination of that question from the administrative agency.

from the requirement that administrative remedies be exhausted. In the *Waterman* case this Court characterized as a question of law the issue as to "whether the contracts in question are subject to the Act" (327 U. S. at 544), but nevertheless held in unqualified terms that the district court could not decide such a question of "coverage when the administrative agencies authorized to do so have not yet made their determination" (327 U. S. at 544). And in the *Myers* case this Court declared, citing many cases, that the exhaustion rule "has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter" (303 U. S. at 51). Respondent's argument that its accounts are not subject to the constitutional jurisdiction of the Commission under the Commerce Clause is identical with the contention of Bethlehem in the *Myers* case. Its other contentions do not present issues so different in nature as to make the principle of the *Myers* case inapplicable.

C. *The Absence of a Final Administrative Order Does Not Justify Failure to Exhaust Administrative Remedies.*—The court below thought that "the exclusive method of review stipulated in the Federal Power Act'" did not bar a declaratory judgment because the "federal commission has made no final order" and "there is nothing from which an appeal could be taken by the com-

pany under the statutory scheme of appeal" (R. 61). We submit that the absence of a final order does not justify judicial intervention at this time but the contrary.

In Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375, this Court held that the judicial review provisions of the Federal Power Act applied only to final orders and prevented a removal to the courts of a question pending before the Commission at any time before the entry of a final order.[18] The Court's reasoning was that any other construction would afford "opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions [and] do violence to the manifest purpose of the provision." (304 U. S. at 383–384). The same considerations apply even more strongly against district court review of such orders, for the "constant delays" due to such review would be much greater. Cf. *Securities and Exchange Commission* v. *Andrews*, 88 F. 2d 441, 442 (C. C. A. 2).

Furthermore it should be obvious that, even apart from the scheme of the Federal Power Act, adoption of the theory of the court below would nullify the entire exhaustion doctrine, inasmuch as there is never a final order until the adminis-

[18] An interlocutory order is, of course, reviewable on review of the final order in the proceeding, *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 452 (App. D. C.).

trative remedy has been exhausted. In the *Myers* and *Waterman* cases, for example, it could equally have been argued that since there was no final order—indeed, as here, not even a hearing—it was appropriate for the courts to disregard the exhaustion rule.[19]

D. *The Exhaustion Principle Applies When the Dispute is as to the Interrelation of Federal and State Statutes.*—The court below suggests (R. 61) that the exhaustion principle may not be applied when there is a dispute as to a "legal" question between state and federal sovereignties, that at least when resolution of such conflict may require the construction of a state statute a state may not be compelled to appear before a federal administrative agency.

As we have indicated (*supra*, pp. 17–18), whether

[19] Respondent argues that the *Myers* case is distinguishable because the National Labor Relations Act specifically gives the Labor Board exclusive jurisdiction over the subject of unfair labor practices. No such distinction can be made of the *Waterman* case. Although the Renegotiation Act has an explicit provision giving the Tax Court exclusive jurisdiction once prior proceedings have been concluded, there is no such express language as to the authority of the Chairman of the Maritime Commission and other departmental renegotiation boards. The *Waterman* case was brought before any of the earlier administrative steps had been completed, and the Court's decision held that a suit would not lie while a case was before the readjustment boards, as well as prior to a Tax Court decision. The clear implication of the Federal Power Act, like the Renegotiation Act, is that the administrative remedy shall be exclusive regardless of the absence of express language to that effect.

there is a conflict between the requirements of the state and federal agencies is one of the issues set for hearing before the Commission. Until the Federal Commission issues its final order, after the hearing, no one can say whether such a conflict exists, or if so how far it extends. And the Federal Commission will not be faced with the necessity of construing the Arkansas law unless it first holds, contrary to *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119, *supra,* pp. 15–16, that the proviso in Section 301 (a) of the Federal Act gives the states power to prevent the Federal Commission from prescribing accounting requirements inconsistent with state law.[20] Apart from this issue the state law is relevant only in relation to the question whether the accounting requirements of each of the two agencies apply exclusively and inconsistently to "fundamental corporate accounts". That question can be

[20] It is to be noted that the legislative history of the Act shows not only a general purpose to meet the need for a nationwide uniform accounting system (S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17–18, 53; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8, 30–31; 79 Cong. Rec. 10574–10575; and House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 2170–2171) disclosed by the Federal Trade Commission's report of its investigation of the public utility industry (House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 178–179), but also shows the specific rejection in conference (H. Rep., No. 1903, 74th Cong., 1st Sess., pp. 63–64, 75) of a hastily adopted House amendment which would have done exactly what respondent now seeks, and which was opposed for that reason (79 Cong. Rec. 10574–10575).

avoided if the Commission can work out a practicable method of accommodating the demands of the two agencies.

In any event, when Congress is exercising its paramount commerce power, the procedure which it establishes is as binding upon the states as on private persons. Numerous cases under the Interstate Commerce Act attest the lack of novelty in having states submit themselves to federal administrative procedures before resorting to the courts, even on extremely important questions, including matters of constitutional law. E. g., *New York* v. *United States*, 257 U. S. 591, 600–601; *North Carolina* v. *United States*, 325 U. S. 507; *New York, et al.* v. *United States*, Nos. 343–345, this Term, pending on appeal.

The administrative procedures under the Power Act are regularly utilized by states, state commissions, and municipalities, as shown by the Commission's reported opinions, and by the court cases in which they have both opposed Commission orders (e. g., *Department of Conservation of Louisiana* v. *Federal Power Commission*, 148 F. 2d 746 (C. C. A. 5), certiorari denied, 326 U. S. 717; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880) and supported them (e. g., *Federal Power Commission, et al.* v. *Hope Natural Gas Company*, 320 U. S. 591; *Panhandle Eastern Pipe Line Company* v. *Fed-*

eral Power Commission, et al., 324 U. S. 635; *Colorado Interstate Gas Company* v. *Federal Power Commission, et al.*, 324 U. S. 581). Furthermore, the Federal Power Act contains numerous provisions showing that the system there established was intended to apply to the states. Included among those provisions are a grant of a right to any "State, municipality, or State commission," among others, to complain against any "licensee" or "public utility" (Section 306 [21]); a grant of authority for their admission as parties to proceedings (Section 308 (a)); a grant to them of a right to apply for the rehearing which is the prerequisite to judicial review (Section 313 (a)); and a grant of a right, as a "party" when aggrieved by an order of the Commission, to obtain judicial review (Section 313 (b)). In administering the Act, the Commission not only notifies the states of proceedings before it when required to do so by the Act (e. g., Sections 4 (e), 4 (f), 202 (a), 202 (b), 203 (a), 207, 302 (b)), but follows the general practice of notifying them in all types of proceedings (11 F. R. 177A-493, 177A-502, September 11, 1946, Secs. 02.39, 1.19 (b)).[22]

That the Commission may, if it thinks it neces-

[21] The text of the cited sections appears in the pamphlet copy of the Federal Power Act.

[22] Both the State of Arkansas and the Department formally intervened in the proceeding now pending before the Commission after the District Court's dismissal of the instant complaint (*supra*, 10, n. 9.).

sary, construe state laws to the extent of determining whether they are applicable or superseded is shown by this Court's recent decision in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946. That case presented the question whether the Commission had properly dismissed an application for a license for a hydroelectric project because the applicant failed to show compliance with an Iowa statute—compliance which the State of Iowa contended was required by Section 9 (b) of the Federal Power Act. This Court reversed the affirmance of the Commission's order of dismissal, indicating that the Commission had erred in not considering and acting on its "own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with * * * laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act" (slip opinion, p. 6). Thus the Commission has been required to do precisely what the Court of Appeals in the instant case said could "hardly" be done, viz., "to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act" (R. 61).

E. *The Assumption of the Court Below that the Commission Would Assert Exclusive Jurisdiction in Conflict with that of the State is Both*

Unfounded and Irrelevant.—The court below held that the complaint "presents an unusually appropriate opportunity for the exercise of the judicial function" (R. 61), notwithstanding the fact that administrative proceedings for the determination of the issue had not been completed, because (R. 59):

> * * * it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

What has been said in our introductory statement (*supra*, pp. 14–19) is sufficient to show that the Commission has not indicated that it intends to assert exclusive jurisdiction conflicting with that of the State. See also pp. 33–40, *infra*.

Furthermore, even if the contrary were true, the court below would not be warranted in failing to require completion of the administrative process. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159; *Highland Farms Dairy Co.* v. *Agnew*, 300 U. S. 608.

In the *Gilchrist* case, the New York Interborough Rapid Transit Company had applied to the Transit Commission for an increase in subway fares. Before the Commission had officially acted upon the application, the company obtained

a federal court injunction against commission interference with the establishment of the proposed higher fares. In this Court the company maintained that "nothing remained to be done [by the commission] but the mere formality of evidencing by a formal order a decision already made" (279 U. S. at 186). The Court, although questioning the basis for that assumption (279 U. S. at 206), accepted it for the purpose of its decision, but nevertheless held that the respondent must first complete the prescribed administrative procedure (279 U. S. at 207–209):

> At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction to permit a new rate * * *. The members of the Commission intended to take official action appropriate to the circumstances, and neither what they did nor what they intended to do gave any adequate cause for complaint * * *.
>
> Under the doctrine approved in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 231, and *Henderson Water Company* v. *Corporation Commission,* 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

In the *Highland Farms Dairy* case, the Court said (300 U. S. at 616–617):

> One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. He should apply and see what happens.

If, as the Federal Power Act provides in Section 313 (a), the filing of a petition for rehearing, after the administrative decision has been definitely, though tentatively, indicated, is a prerequisite to judicial review,[33] *a fortiorari* the Commission should be afforded the opportunity at least to hold its hearing in advance of any decision before the matter is taken to a court.[34]

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[33] *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 287 (App. D. C.), certiorari denied, 305 U. S. 625. Cf. *Levers* v. *Anderson*, 326 U. S. 219, 222–223.

[34] *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, a state tax case, is not to the contrary. The question there was whether a proceeding to review an administrative determination of a tax in a district court which had jurisdiction to review such determinations, was invalidated by the fact it had been initiated before certain formalities of certification and notice of the determination had been completed, although the administrative decision on the controverted aspects of the case had been orally announced.

So also *Dodez* v. *United States*, No. 86, October Term, 1946, decided December 23, 1946, is not opposed. For there the remaining administrative steps which Dodez was held not required to exhaust were "purely formal steps to be taken by camp officials" offering no possibility that the draft registrant might be "rejected or released from the duty to

remain and perform the further duties imposed on him" (slip opinion, pp. 10–11).

For discussions of the *Schnader* and *Gilchrist* cases, see Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. R. 560, 572–573; Berger, *Exhaustion of Administrative Remedies*, 48 Yale L. J. 981, 990–991.

II

THERE IS NO "CASE OF ACTUAL CONTROVERSY" COGNIZABLE BY THE DISTRICT COURT UNDER THE DECLARATORY JUDGMENT ACT

The facts in this case also indicate that there is no "actual controversy" cognizable under the Declaratory Judgment Act. For until the administrative process has been completed, the impact of the Commission's accounting authority is obviously too contingent, speculative, and conjectural to present any justiciable issue.

The "actual controversy" which the complaint attempted to plead and which the court below held to be sufficient under a "liberal" construction of the Declaratory Judgment Act (R. 59), is this: that the Department and the Commission are both claiming an exclusive right to require classification and adjustment of "write-ups" and other excesses over original cost in respondent's capital accounts (*supra*, pp. 5–10). But no facts relied on by the court show that either the Commission or the Department has exercised any power which necessarily excludes, affects, or constrains actions by the other agency.

A. *The Facts Relied on Do Not Disclose Any Claim of Power by the Commission Which Necessarily Excludes, Affects, or Constrains Action by the Department.*

To support the conclusion that the Commission claimed and "fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission," the court below concededly did not rely upon well pleaded facts admitted by the motion to dismiss,[25] but upon the Commission's "consistent adherence to the original cost standard" in its prior decisions;[26] the "position" taken by the Commission's staff

[25] The court conceded that the allegations of the complaint alone were insufficient to state a controversy:
"But, in its argument, the federal commission characterizes the allegations of the complaint to the effect that it will prescribe, control and regulate the official accounting records as nothing more than the appellant's [here respondent's] prophecy concerning its future action. It says these allegations, therefore, do not amount to facts well pleaded and are not admitted by the federal commission's motion to dismiss. *There would be force in this argument* were it not for the fact that the federal commission's motion to dismiss contains this language: 'No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to 'public utilities' including plaintiff [respondent here], is not affected by any accounting requirements prescribed under State law.'" (R. 65. Emphasis supplied.)

[26] The Court of Appeals was not justified in concluding from past decisions what the Commission's action would be in the present instance, even if those decisions had been in point. See *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 487–488.

in the reports served on respondent (Exs. 5, 6) and the "unmistakable tenor" of the Commission's order serving the supplementary staff report (Ex. 7, Appendix C, *infra*, pp. 65–69);[n] and statements made in the Commission's motion in the instant case to dismiss on the alternative ground of failure to state a cause of action (R. 40) and in its brief in support thereof[n] (R. 59; see R. 56–59).

None of these materials, even if properly noticed by the court, substantiates the postulate

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[n] By its "show cause" orders of June 15, 1943, and September 27, 1944, the Commission ordered the reports of its staff's examination of respondent's original cost and reclassification studies served on respondent, called for response to the recommendations contained in the staff reports, and set a public hearing on the issues raised (*supra*, pp. 4, 5, 7). In this manner the Commission "questioned" certain of the accounting entries proposed to be made by respondent in reclassifying its accounts in accordance with the Commission's Uniform System of Accounts (Ex. 4), and placed on respondent "the burden of proof to justify every accounting entry questioned." *Northwestern Electric Company* v. *Federal Power Commission*, 134 F. 2d 740, 743 (C. C. A. 9), affirmed, 321 U. S. 119; *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2d 280, 295 (App. D. C.), certiorari denied, 317 U. S. 652. In view of the terms of Section 301 (a) of the Act (pamphlet copy, p. 37), there seems no warrant for attributing any untoward significance to any "tenor" of Exhibit 7.

[n] The court below erred in using statements made in the second ground of the Commission's motion to dismiss (R. 40-41) and the supporting brief, to turn the motion into a speaking demurrer in order to cure the failure of the complaint to plead an actual controversy. *Cohen* v. *United States*, 129 F. 2d 733, 735–736 (C. C. A. 8).

essential to the conclusion it reached, stated in the dissenting opinion of Judge Morris (R. 66) as follows: "that one authority, and only one, can control the keeping of such [fundamental corporate] accounts"; that the exercise of such control by one authority necessarily excludes its exercise by the other; and that the "Commission here is seeking to exercise its authority to the exclusion of the right of the Arkansas Department * * *." In none of the statements, decisions, or other actions referred to by the court to supplement the complaint has the Commission sought to exclude any exercise of authority by any state over the accounts, memoranda or records of any "public utility" subject to its jurisdiction; or ordered any such "public utility" not to comply with state accounting regulations; or indicated or held that any exercise of authority by it over the fundamental corporate accounts of a "public utility" either excluded, constrained or affected any exercise of authority by any state over the same company's accounts, memoranda, or records. See pp. 14–19, *supra*.

The court below cited *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119, among the materials it relied on. But the Commission's order which was there under review was characterized by this Court, in the face of contentions similar to those here sought to be advanced (*supra*, p. 16, n. 11), as one which

"does not purport presently to affect or constrain action by the states within their fields" (321 U. S. at 125). Clearly the mere fact that the Commission's system of accounts is a "cost system of accounting" (i. e., one that requires electric plant accounts to be stated at original cost, and legitimate acquisition costs in excess of original cost to be recorded in a separate account, with "write-ups" segregated in another account for elimination),* as recognized by this Court in the *Northwestern* case (321 U. S. at 123), provides no logical basis for the conclusion that the Commis-

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* It is difficult to perceive the materiality of the court's characterization of the Commission as an "exponent of the original cost *theory of establishing a rate base*" (R. 57, emphasis supplied) as distinguished from "prudent investment." Certainly this Court's reference in the *Northwestern* case, 321 U. S. 119, 123, to the Commission's system of accounts as a "cost system of accounting" (not "original cost" but "cost", which would include "acquisition cost") in a case which was not a rate case and did not involve determination of a rate base, and where the only dispute was over a "write-up" and not over an excess of bona fide, arm's length "acquisition cost," over "original cost" (i. e., cost to the person first devoting to the public use) does not support the proposition for which the court uses it.

Furthermore, the Commission has never excluded legitimate acquisition cost (prudent investment) in excess of original cost from the rate base in any of its formal rate cases. The question has never arisen as an issue. For a discussion of the origins of the original cost theory of public utility regulation and the part played therein by state commissions, see Samuel Cahan, *Original Cost for Utility Accounting, Public Service Commission of State of New York*, 1939.

sion claims "sole and exclusive" jurisdiction (R. 59)."[30]

Thus also the Commission's decision *In the Matter of The Montana Power Company* (57 P. U. R. (N. S.) 193, 196, note 3; application for rehearing denied, 59 P. U. R. (N. S.) 58, 59–60), cited by the court below (R. 57, n. 10), shows that the Commission did not claim a "sole and exclusive" power, but quite the contrary. For the order the Commission there entered is the only one entered after a hearing in which the Commission has prescribed accounting entries differing from those approved or prescribed by a state commission. Its reasons for doing so are explained in its opinion.[31] Notwithstanding the disparity of the entries ordered by the two commissions, The Montana Power Company, which is also

[30] For a discussion of this classification of book values, see Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 Harv. L. R. 433, and 693.

[31] On application for rehearing the Commission said (59 P. U. R. (N. S.) at 59–60):

"* * * In effect, the position of the Montana Commission is accepted by the petitions [or rehearing] as the proper standard of accounting treatment; virtually every departure by this Commission from that standard is assigned as error * * *. Congress, in conferring upon this Commission jurisdiction over the accounts of 'licensees' and 'public utilities' provided for their uniform treatment. While Congress provided that 'public utilities' should not thereby be relieved from compliance with lawful state accounting requirements, it rejected an amendment which would have created substantially the situation for which the company now contends."

a subsidiary of the Bond & Share system, never applied to the Federal Power Commission or to the courts for relief because of any alleged factual inability on its part to comply with the orders of both commissions."[22]

What the Commission consistently has said in its opinions, as in its motion to dismiss and supporting brief in this case, is that its power to regulate a "public utility's" accounts is not "affected by" or "subordinated to" state accounting requirements."[23] This leaves unanswered the technical accounting question whether it is factually possible for both federal and state agencies to regulate the fundamental corporate accounts if disparate entries are prescribed. The initial decision of such a question properly belongs to the administrative rather than the judicial stage. That question, among others, the Commission had

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[22] Petitions for review of the Commission's order were duly filed in the United States Court of Appeals for the District of Columbia, Nos. 9047, 9048, on June 23, 1945, but dismissed on petitioners' motions on January 29 and February 4, 1946.

[23] R. 56, 58; *Northwestern Electric Company*, 2 F. P. C. 327, 330, affirmed, 125 F. 2d 882, 885, 886 (C. C. A. 9); *Northwestern Electric Company* v. *Federal Power Commission*, *supra*, pp. 15–16; *The Montana Power Company*, *supra*, p. 38. Other Commission decisions cited by the court of appeals (R. 57–58) are completely silent on the relation of the accounting requirements prescribed by the Commission to those prescribed by the States. As to *Northern States Power Company*, F. P. C. Opinion No. 138, July 3, 1946, relied upon by respondent (Br. in Opp., p. 12), see p. 16, n. 12, *supra*.

set for hearing coupled with the further technical accounting question of how it can be accomplished. On this key question the lower court had no basis for anticipating what the Commission would decide and certainly no basis for any legal presumption that disparate accounting requirements cannot be complied with in the same fundamental corporate accounts.[34]

B. *The Facts Relied On Do Not Disclose Any Exercise of Power by the Department Which Excludes, Affects, or Constrains Action by the Commission.*—Although the court below refers to the order of the Department as one "which had definitely claimed exclusive jurisdiction over the official accounting records" (R. 51, cf. complaint, R. 16), this conclusion too, depends on the court's unwarranted factual assumption that there can be "only one set of figures" to truly reflect the company's operations, to show the real results of its operations, and to represent "its true financial condition" to stockholders, the public, prospective investors, or creditors (R. 49).[35]

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[34] See *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 324 U. S. 154, 159–160, where this Court upheld disparate reserve account requirements imposed by separate states on a fire insurance company.

[35] We do not see how it can be said that one set of figures discloses the "true financial condition" to the public if two public regulatory agencies have unreconciled conceptions of that condition. Obviously the court's statement would not be true as to accounts kept for depreciation for income tax purposes, which, as is well known, differ from those used in selling bonds.

The Arkansas statute (Appendix A, *infra*, p. 49) does not purport to establish any exclusive system of accounts. Nor does the Department's order (Ex. 2, Apendix C, *infra* pp. 53–65) in this case directing the accounting entries, adjustments, and dispositions to be made, contain any language of exclusion. The Department's opinion (Ex. 2, Appendix C, *infra*, p. 54), contains the clause: "the Department is the only regulatory authority having such all-inclusive jurisdiction," but the jurisdiction referred to had expressly included jurisdiction over retail rates. The Commission having no jurisdiction over retail rates, the Department's statement may be accepted as referring to that and as expressing no opinion on the question of whether its accounting powers were "sole and exclusive," a question not discussed or shown to have been considered. See the portions quoted R. 50–51, note 5.

It is true that in its cross-claim (R. 29–33) (which was dismissed without being appealed) and brief *amicus* in the court below Arkansas has indicated its agreement with respondent's position that the Department's authority is exclusive. If this be treated as a conclusive manifestation of the Department's position, it indicates that the Department will attempt to exercise exclusive jurisdiction over a utility's "fundamental" accounts, but not that any statute or order, rule or regulation of the Department has,

as yet, implemented that position. In any event, a controversy must have more than one party, and until the Commission has reached a decision in this case, a declaration of the Department's views would not be sufficient to warrant declaratory relief.

C. *Any Differences Between the Commission and the Department Are Not Now Ripe For Judicial Consideration.*—The well pleaded facts alleged in the complaint and admitted by the motion to dismiss make it plain that there is no immediate and "irreconcilable" conflict between the Commission and the Department, since the Commission is not issuing any presently effective order to the respondent with respect to the reclassification or adjustment of its accounts or preventing it from complying with the Department's order of June 24, 1944 (Ex. 2, Appendix C, *infra,* pp. 53–65).

The hypothetical, conjectural and contingent nature of any prospective conflict is apparent from a consideration of the administrative steps taken. As already stated, the only orders issued by the Commission have been the "show cause" orders of June 15, 1943, and September 27, 1944, and the order of February 20, 1945, setting a hearing (*supra,* pp. 4, 5, 7), which had the effect, contemplated in Section 301 (a) of the Act, of questioning certain accounting entries proposed in respondent's reclassification and original cost studies, and of notifying respondent of its burden to

justify such entries (*supra*, p. 35, n. 27). They were, therefore, mere procedural orders or notices formulating the issues and not determining legal rights or duties. More important, the question of sole and exclusive jurisdiction was first raised by respondent's petition filed November 22, 1944, and was at an interlocutory stage, having been only set down for hearing with the other issues in the case (*supra*, p. 7).[36] There was, accordingly, no "concrete case admitting of an immediate and definite determination of the legal rights of the parties" and no sufficient basis for any decree which could be "of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts," as required for jurisdiction under the Federal Declaratory Judgment Act. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 429.[37]

[36] See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385–386; *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 449–450 (App. D. C.).

[37] In the court below the respondent relied on *Interstate Natural Gas Co.* v. *Louisiana Public Service Commission*, 33 F. Supp. 50, 34 F. Supp. 980 (E. D. La.), and *Kentucky Natural Gas Corp.* v. *Public Service Commission*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. C. A. 6). In the *Interstate* case, the administrative agency had held a hearing on the jurisdictional question and had issued its final order on that question (33 F. Supp. at 50); in the *Kentucky* case the briefs show that the Commission had issued its order determining the company to

The allegations, adopted by the court below (R. 57–58, 60), that the result of the Commission's hearing was a foregone conclusion, were "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774. The contingent nature of any conflict is shown by the factual considerations already pointed out (*supra*, pp. 33–40), which make pertinent the statement of Mr. Justice Brandeis, dissenting, in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 613:

> It is possible that if the Commission made an order, the order would be of such a character as not to affect seriously the interests which plaintiffs seek to protect. * * *

The quasi-legislative act of prescribing accounting requirements, moreover, has not been completed and will not be completed until the

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be a "public utility" under the statute. In each case the Commission's order was being reviewed in the manner contemplated by the relevant statutory provisions (Baldwin's Kentucky Rev. Stat., 1942, § 278.410; Louisiana Gen. Stat., 1932, § 7937). In neither case was the court's jurisdiction questioned and in neither does the court's opinion make any reference to the question of exhaustion of administrative remedies or primary exclusive jurisdiction. Neither opinion discusses any reasons for concluding that there was jurisdiction to render a declaratory judgment. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511; *New* v. *Oklahoma*, 195 U. S. 252, 256.

Commission has issued its final order at the conclusion of the present proceeding. Judicial relief should be postponed until the "final legislative action" has been taken. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 230.

There is here, at most, "a difference of opinion between the officials of the two governments," and even then, not on the critical question as to the mutually exclusive or non-exclusive nature of their respective powers, but on the reclassification and adjustments which should be required. Such a difference of opinion, even if it were on the critical questions, would not constitute a justiciable controversy in the constitutional sense at its present stage (*United States* v. *West Virginia,* 295 U. S. 463)[20] and the requirements of a "controversy" under the Declaratory Judgment Act are "no less strict." *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. The predetermination of "the rights of different sovereignties, pregnant with future controversies, is

[20] The Court there said (295 U. S. at 473–474):
"At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation * * * and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. * * *"

beyond the judicial function." *United States* v. *Appalachian Electric Power Company,* 311 U. S. 377, 423. And there has been a particularly marked judicial reluctance, even on review of final commission orders challenged as invading the regulatory domain of the states, to anticipate a conflict in the absence of any Commission exercise of a sole and exclusive regulatory power.[29]

D. *There Is No Necessary Risk Of Substantial Pains Or Penalties.*—The opinion of the court below reiterates in varying terms the conclusion that if respondent were required to await a decision of the Commission, if that decision asserted exclusive power, and if respondent were "then to decide for itself the important legal question as to which commission under the two statutes involved is its real master, it would be faced with the dangerous possibility of making an erroneous interpretation of the two statutes and, because of it, of suffering pains and penalties which follow a violation of the law, which by that time the

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[29] Compare the company's brief with the opinion of this Court in the *Northwestern Electric Company* case, *supra*, p. 16, n. 11; petitioner's brief, p. 39, with opinion of the Circuit Court of Appeals for the Ninth Circuit, *Pacific Power & Light Company* v. *Federal Power Commission*, 141 F. 2d 602, No. 10386; petitioner's brief, p. 45, *et seq.*, with the opinion of the Circuit Court of Appeals for the Ninth Circuit, *California Oregon Power Company* v. *Federal Power Commission*, 150 F. 2d 25, No. 10429, certiorari denied, 326 U. S. 781; and see *Northern States Power Co.* v. *Federal Power Commission*, 118 F. 2d 141, 144 (C. C. A. 7).

company already would have committed." R. 61; cf. R. 53, 60.

This statement ignores the fact that in the event an order asserting exclusive power is entered by the Commission, the Federal Power Act affords respondent an opportunity to have that order reviewed by a circuit court of appeals, and the right to petition this Court for certiorari. Section 313 (b) (pamphlet copy, p. 47). In addition, Section 313 (c) of the Act permits the Commission or the reviewing court, on proper showing, to stay a commission order pending final decision. Denial of a declaratory judgment, then, does not mean that respondent has to determine for itself the legality of the Federal Power Commission's order.[40] Compare *Macauley* v. *Waterman Steamship Corporation*, 327 U. S. 540, 545, where the possibilities of penalties seem to have been clear, but declaratory relief was nevertheless refused.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment by the Court of Ap-

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[40] The availability of an administrative procedure, to which the respondent, the State of Arkansas, and the Department have, in fact, submitted the present question (*supra*, p. 10, n. 9), differentiates this case from *Texas* v. *Florida*, 306 U. S. 398, 409–410; cf. *Massachusetts* v. *Missouri*, 308 U. S. 1, 15–16.

peals should be reversed, with instructions to affirm the judgment of the district court.

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Federal Power Commission.
JANUARY 1947.

APPENDIX A

The pertinent provisions of the Arkansas Utility Act (Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935) are as follows:

SEC. 1 (d). The term "public utility" when used in this Act, includes persons and corporations, or their lessees, trustees and receivers, now or hereafter owning or operating in this state, equipment or facilities for:

(1) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam or other agency for the production of light, heat or power to, or for, the public for compensation;

* * * * *

(3) The term "public utility" as used in this Act for rate making purposes only shall include persons and corporations, or their lessees, trustees and receivers producing, generating, transmitting, delivering or furnishing any of the foregoing services to any other person or corporation for resale or distribution to or for the public for compensation.

SEC. 2. (a) There is hereby created a department of the Arkansas Corporation Commission to be known as the "Department of Public Utilities." It shall consist of three members to be known as commissioners, one of whom shall be a lawyer. * * *

missioners, one of whom shall be a lawyer.

SEC. 8 (c). The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like

manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

SEC. 19. The Department, upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to:

(1) Find and fix just, reasonable, and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.

* * * * *

(4) Ascertain and fix the value of the whole or any part of the property of any public utility, insofar as the same is material to the exercise of the jurisdiction of the Department, and the Department may make revaluations of the whole or any part of said property, from time to time and ascertain the value of any new construction, extension, and additions to, or retirements from, the property of every public utility.

(5) Require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Department may prescribe; ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed by the Department.

SEC. 22 (a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

SEC. 61 (a). Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rules or regulation by all officers, agents, and employees of every public utility.

(b). Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

APPENDIX B

The provisions of the Federal Declaratory Judgment Act (Judicial Code, Sec. 274D, as added by the Act of June 14, 1934, 48 Stat. 955, and amended by the Act of August 30, 1935, Sec. 450 (a), 49 Stat. 1027; 28 U. S. C. 400) are as follows:

> Sec. 274D. (1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> (2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> (3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

APPENDIX C

Relevant provisions of Exhibit 2 to the complaint are as follows:

State of Arkansas

DEPARTMENT OF PUBLIC UTILITIES

At a session of the Department of Public Utilities, held in its office, State Capitol, Little Rock, Arkansas, on this 24th day of June, 1944. Present: Marvin Hathcoat, Chairman; A. B. Hill, Joseph Morrison, Commissioners.

Docket No. 225

IN THE MATTER OF THE GENERAL INVESTIGATION ON MOTION OF THE DEPARTMENT OF THE ELECTRIC OPERATIONS OF THE ARKANSAS POWER & LIGHT COMPANY

* * * * *

JURISDICTION OF THIS DEPARTMENT

This Department was created by Act No. 324 of the Acts of 1935, approved April 2, 1935. It is vested with power and jurisdiction to regulate all public utilities doing business in Arkansas with power to prescribe reasonable, uniform rates and practices. The Act expressly provides that the Department, upon its own motion, shall, upon reasonable notice after a hearing, "find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility". The Department is charged with the duty to "ascertain and fix the value of

the whole or any part of the property of any public utility".

Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to "establish a uniform system of accounts" to be kept by Respondent and to "prescribe the manner in which such accounts shall be kept". The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction.

The Department is given power to supervise, regulate, restrict and control the issuance of stocks, bonds, notes and other evidence of indebtedness by all public utilities doing business in Arkansas.

The Act expressly provides that "every public utility, and every person or corporation, shall obey and comply with each and every requirement of the Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in all matters herein specified, or any other matter in any way relating to or affecting the business of any public utility".

The foregoing powers of the Department were sustained by the Arkansas Supreme Court in *Dept. of Public Utilities* vs. *The Ark. La. Gas Co.*, 200 Ark. 983.

* * * * *

It is therefore ordered:

I. ACCOUNTS AND ADJUSTMENTS

A. *Accounts.*

The accounts of Respondent shall be stated as of January 1, 1944, as follows:

1. Account 100—Electric Plant—shall be stated at	$54,357,699.67
2. Account 100.1—Electric Plant in Service—shall be stated at	45,259,363.27
3. Account 100.3—Construction Work in Progress—shall be stated at	405,426.54
4. Account 100.4—Electric Plant Held for Future Use—shall be stated at	143,817.58
5. Account 100.5—Electric Plant Acquisition Adjustments—shall be stated at	6,947,058.92
6. Account 100.6—Electric Plant in Process of Reclassification, representing total remaining net fees paid to affiliated construction and other companies of $857,016.03 and Blakely Dam lands of $745,017.33, shall be stated at	1,602,033.36
7. Account 107—Electric Plant Adjustments—shall be stated at	3,284,302.76
reflecting (a) $2,678,413.12 remaining excess of book cost over cost to Respondent or its affiliate, and (b) $605,889.64, reflecting unrecorded retirements of electric plant.	
8. Account 108—Other Utility Plant—shall be stated at	6,397,916.83
which, in turn, shall be subdivided as follows:	
a. Gas Plant	1,312,134.05
b. Street Railway & Motor Coach Plant	5,085,782.78
9. Account 110—Other Physical Property—shall be stated at	27,124.17
10. Account 150—Discount on Capital Stock—shall be stated at	75,814.12
11. Account 151—Capital Stock Expense—shall be stated at	254,442.06
12. Account 140—Unamortized Bond Discount and Expense—shall be stated at	1,190,346.42

13. The Respondent's Reserve for Depreciation or Retirement of Electric Plant, as of December 31, 1943, shall be segregated departmentally, as indicated below:

Electric Property	$5,154,627.22
Gas Property	132,169.11
Railway and Motor Coach	1,817,422.89

and shall remain segregated from such date henceforth, being increased by the amount of such credit as shall be placed therein by accruals or other credits and decreased by the retirement of property or other debits.

B. *Adjustments.*

Within 90 days from the date of this order, the Respondent shall have:

1. Disposed of amounts hereinabove ordered to be charged to Account 107, by charging to Account 250—Reserve for Depreciation or Retirement of Electric Plant—the amount reflecting unrecorded retirements above, of $605,889.64.

2. Eliminated the amount in Account 107 of $2,678,413.12, set forth above, and eliminated any remaining Unamortized Debt Discount and Expense applicable to previously retired bonds ($815,546.00 at December 31, 1943) by charges to Earned Surplus or Capital Surplus theretofore created for the purpose.

3. Reported to the Department the proportion of fees (herein required to be included in Account 100.6—Electric Plant in Process of Reclassification) includible in Account 100 and Account 108 and the proportion of profit to affiliates therein contained, which profit, if any, shall thereupon be included in Account 107, and, thereafter, amortized by monthly installments of not less than one percent (1%) of such profits, if any, beginning within the month next succeeding the month of approval of such report, by charges to Account 537, with concurrent credits to Account 107, until the balance in Account 107 is extinguished. That part of such fees not representing profit to affiliates shall, upon proper find-

ing and order of the Department, be transferred to Account 100 or Account 108.

4. Made full and complete disclosure of the history, facts, and circumstances attendant to the inclusion of the cost of Blakely Dam lands in Account 110 for further finding and order of the Department.

Upon compliance with subdivisions A and B of this Part I of this order, the Balance Sheet Accounts of the Respondent will properly reflect the accounts of the Respondent and shall be considered to have been approved by the Department.

C. *Amortization Account 100.5.*

The amount of $904,116.10, found by the Department to be included in Account 100.5 and attributable to increase in structural value of existing electric property, shall be amortized by Respondent in the same ratio and at the same time as the items of physical property to which it is attributable are depreciated.

II. Rate Base, Annual Return, and Rate Reduction

A. *Rate Base.*

The rate base applicable to the Electric Property of Respondent at January 1, 1944, was and is $47,996,290.00.

The rate base applicable to Electric Property of Respondent at any time in the future shall be a proportion of the capital liabilities and surplus of Respondent, determined from the sum of amounts in Accounts 200, 201, 202, 203, 204, 205,

210, 211, 212, 213, 240, 270, and 271, less the sum of amounts in Accounts 140, 150, 152, and 153, distributed as follows:

1. The Electric Plant proportion of the total property shall be determined in the following manner:

a. From the amount in Account 100 shall be deducted the amounts in Accounts 250, 251, and 252.

b. From the total in Accounts 108, 110, 111, 112, 113, and 114 shall be deducted the amount in Account 253.

c. The proportion of electric plant to total property shall be the percentage that the amount determined under item a. bears to the sum of the amounts determined under items a. and b.

2. The resulting proportion shall be the applicable proportion of total capital liabilities and surplus of the Respondent, which shall constitute the electric rate base.

B. *Annual Return.*

The fair annual return allowable on the rate base is six percentum (6%) thereof, and rates and charges shall be sufficient at all times to produce such return, after deducting all charges, taxes, and all reserves applicable to the operations of the Respondent.

C. *Rate Reduction.*

Within 60 days after the date hereof, Respondent shall file, for the approval of this Department, reduced and revised schedules of prices and terms, or rate schedules, for electric services, designed to reduce its gross electric operating revenues in the amount of $975,000 per annum.

Such schedules shall be effective as of October 1, 1944, except as otherwise directed by the Department.

III. Annual Depreciation and Maintenace

The annual allowance for maintenance and depreciation shall be $1,600,000.00 (which includes, and shall hereafter include, total net revenues from the steam heat operations which shall be segregated therefor), plus three percentum (3%) per annum of the net additions to depreciable electric property made after December 31, 1943. For the current year in which this computation is made, the net additions to depreciable electric property shall be the average net additions during that year and shall be calculated on the average basis of the total annual net additions made, equally throughout the year, and, therefore, shall be based on one-half the total net additions at the rate of three percentum (3%).

The term "depreciable electric property" as used herein shall have the meaning as indicated under the definition of "Depreciation" in the Uniform System of Accounts for electric utilities.

IV. Continuous Supervision of Respondent

The Department hereby makes effective the following provisions for the continuous supervision of Respondent's business, property, accounts, rates, services, revenues, and all other matters and things it is empowered by law to do, including the adoption of a sliding scale arrange-

ment for the control and disposition of future earnings, as follows:

A. *Definitions.*

To the extent they appear therein, the terms used in this order have the meaning and definition contained in the Uniform System of Accounts, prescribed for electric utilities in Arkansas in the Department's order dated the 18th day of November, 1942, in Docket 580, unless otherwise indicated.

Such additional accounts and amounts, etc., as are herein prescribed and not included therein, are hereby adopted and approved, effective with the effective date hereof.

1. Gross Electric Operating Revenue means the amounts properly includible in Account 501, *exclusive of the amounts includible in the subdivision of Account 501 hereinafter mentioned.*

2. Revenue Deductions means the sum of the amounts properly includible in Accounts 502 to 507, inclusive.

3. Net Electric Operating Revenue means the difference between Items 1 and 2 above.

4. Electric Rate Base means the applicable proportion of capital stock, debt, and surplus, computed by the method provided in Section II of this order. The rate base in any period shall be the average amount of the base at the beginning and ending of such period.

5. Base Allowable Return means 6% per annum on the rate base described in Item 4 above, plus any amounts includible in Account 535, represented by interest payments to consumers on deposits made to secure the payment of bills for electric service.

6. Excess Net Electric Revenues means the amount by which Item 3—Net Electric Operating Revenue—exceeds Item 5, Base Allowable Return.

7. Deficient Net Electric Revenues means the amount by which Item 5, Base Allowable Return, exceeds Item 3, Net Electric Operating Revenue.

8. Excess Net Electric Revenue Deferred Credit means a deferred credit account hereby created to which Item 6, Excess Net Electric Revenues, shall be credited, or Item 7, Deficient Net Electric Revenues, shall be debited, as appropriate.

9. Excess Net Electric Revenue Deferred Credit Fund means a special fund account hereby created to which cash equal in amount to the credits or debits to Item 8, Excess Electric Revenue Deferred Credit, shall be debited or credited, as appropriate.

B. *Administrative Procedure.*

1. On or before 31 days after June 30th and December 31st of each year, beginning in 1945, the Respondent shall furnish the Department, in the form to be prescribed by the Department, the Rate Base, Revenues, and Expenses, computed in accordance with this order, for the preceding six months' period and the preceding twelve months' period, ending June 30th and December 31st, respectively.

2. For the period up to two (2) years following the cessation of hostilities involving this country (the designation "cessation of hostilities involving this country" to be set at a later date by the Department for the purpose of this order), the Respondent shall accumulate "Excess Net Electric Revenues" in a fund (hereinbefore called

"Excess Net Electric Revenue Deferred Credit Fund" and to be referred to hereinafter as "fund" in this order), which fund shall be disposed of either in part or wholly during such period by returning all or any part of such fund to the Respondent or the electric customers of the Respondent at the discretion of the Department.

3. The "period" designated in paragraph two (2) above may be terminated or extended at the discretion of the Department, upon application by the Respondent or by the Department on its own motion after due notice and hearing.

4. If, at the expiration of the "period" designated above, there remains in the "fund" all or any part of the amount accumulated, such amount shall be distributed as follows:

a. The Respondent shall receive fifty per centum (50%) of the first one-third (⅓) of such "fund", and the electric customers of the Respondent shall be refunded fifty per centum (50%) of the first one-third (⅓) of such "fund". The electric customers' portion shall be refunded in such amounts, manner, and method as shall be prescribed by the Department at that time.

b. The Respondent shall receive twenty-five per centum (25%) of the remaining two-thirds (⅔) of such " fund ", and the electric customers shall be refunded seventy-five per centum (75%) of the remaining two-thirds (⅔) of such "fund". The electric customers' portion shall be refunded in such amounts, manner, and method as shall be prescribed by the Department at that time.

5. Revenues equivalent in amount to the balance in the "Excess Net Electric Revenue De-

ferred Credit" (hereinafter referred to as "deferred credit") shall be kept in a special cash account entitled "Excess Net Electric Revenue Deferred Credit Fund", and any earnings of such "fund" shall be credited to the "fund". Withdrawals from this special cash account, other than those arising from the debits to the "deferred credit" account referred to in paragraph six (6) below, shall be made only upon authorization of the Department.

6. Each month the Respondent shall credit or debit to the "deferred credit" account, as appropriate, any amounts by which the "Base Allowable Return" on that month's "Electric Rate Base" fails to equal or exceeds the sum of the month's Net Electric Operating Revenues, and any amounts includible in Account 535, as defined under "Base Allowable Return". Credits to such "deferred credit" account shall be debited to a subdivision of Electric Operating Revenue, Account 501, and debits to such "deferred credit" account shall be credited to such subdivision of Account 501.

7. If the report due not later than July 31st of each year following the expiration of the "period" mentioned above and indefinitely thereafter shows a balance in the "deferred credit" account exceeding five per centum (5%) of the gross electric revenue for the preceding twelve months' period, all or any portion of the "fund" shall be distributed as determined by the Department not later than December 31st of that year, as follows:

a. The Respondent shall receive fifty per centum (50%) of the first $250,000.00, and the electric

customers of the Respondent shall be refunded fifty per centum (50%) of the first $250,000.00. The customers' portion shall be refunded in such amounts, manner, and method as prescribed by the Department at that time.

b. The Respondent shall receive twenty-five per centum (25%) of the remaining amount designated by the Department to be distributed, and the electric customers of the Respondent shall be refunded seventy-five per centum (75%) of such amount. The customers' portion shall be refunded in such amounts, manner, and methods as shall be prescribed by the Department at that time.

8. Whenever the Excess Net Electric Revenue, for any two consecutive years, is in excess of 5% of the Gross Electric Operation Revenue for such period and after the previously prescribed post-war "period", the Department may require further reduction in electric service rate schedules, to be made applicable to future business.

9. If, during any consecutive three semi-annual periods, the Respondent fails to earn an amount for return equivalent to the Base Allowable Return as defined herein, the Respondent may, subject to the approval of this Department, increase rates and charges by an amount sufficient to produce an amount equal to the Base Allowable Return as defined herein.

V. Retention of Jurisdiction

The Department hereby retains jurisdiction over all matters and things of which this order is the subject, and to which it is directed, and of the Respondent herein.

VI. Effective Date of Order

This order shall be in full force and effect from and after May 10, 1944, except as herein otherwise expressly provided.

By Order of the Department
This 24 day of June, 1944.

[SEAL] Zella Passe,
Secretary.

Exhibit 7 to the complaint is as follows:

United States of America—Federal Power Commission

Before Commissioners: Basil Manly, Chairman; Claude L. Draper, Leland Olds and John W. Scott.

September 27, 1944.

Docket No. IT–5829

In the Matter of Arkansas Power & Light Company

SUPPLEMENTAL ORDER TO SHOW CAUSE

It appearing to the Commission that:

(a) On June 15, 1943, this Commission issued an order requiring Arkansas Power & Light Company ("Company") to show cause in writing, under oath, if any there be, why the Company should not be required to classify $16,610,196.85 in Account 107, Electric Plant Adjustments; $1,108,440.24 in Account 100.5, Electric Plant Acquisition Adjustments; $45,551,920.00 in Account 100.6, Electric Plant in Process of Reclassification; $2,293,567.58 in various Plant in Process of Reclassification Accounts within Account 108,

Other Utility Plant; dispose of $2,402,515.42 in Account 107 in the manner described in paragraph (1) of the order of June 15, 1943; submit plans for the disposition of the remainder of $14,207,681.43 in Account 107 and of the $1,108,440.24 in Account 100.5, and prepare and submit to the Commission revised reclassification and original cost studies respecting the amounts established in Account 100.6 and the various Plant in Process of Reclassification Accounts within Account 108.

(b) On September 18, 1943, the Company filed its response in which, in effect, it proposed to classify $7[illegible],086.11 of its electric plant at December 31, 1936, in Account 107 and $10,429,819.21 in Account 100.5 and Plant Acquisition Adjustments Accounts within Account 108.

(c) Thereafter conferences were held between representatives of the Company, the staff of this Commission, and the staff of the Department of Public Utilities of Arkansas, but said conferences failed to produce complete agreement on the issues.

(d) On January 13, 1944, the Commission set the issues raised by the order of June 15, 1943, and the Company's response thereto, for public hearing on February 16, 1944.

(e) The hearing was postponed from time to time, in order not to interfere with a rate proceeding being conducted by the Arkansas Department of Public Utilities involving the rates of the Company, and on May 13, 1944, the Commission entered an order postponing the hearing "pending further order of the Commission."

(f) The staff of the Commission in the mean-

time has been engaged in making further studies of the Company's response and of other data furnished the staff by the Company, such other data being in the nature of an amendment to the Company's response which have not been formally filed with the Commission by the Company.

(g) As a result of the additional studies, the staff of this Commission has submitted a supplemental report on the reclassification and original cost studies of electric plant of the Company, which report is to be served herewith upon the Company and is made a part hereof by reference.

(h) In the supplemental report the staff recommends that the Company be required to classify $11,881,199.23 in Account 107, Electric Plant Adjustments, and $9,293,057.46 in Account 108.15, Common Utility Plant Acquisition Adjustments, all as more fully set forth at pp. 4 to 16 of the supplemental report.[1]

(i) The staff also recommends in the supplemental report that the Company be required to dispose of the $11,881,199.23 recommended for classification in Account 107 as follows:

To Account 140, Unamortized Debt Discount and Expense, and Account 271, Earned Surplus, in appropriate amounts, representing unamortized debt discount and expense incurred in connection with the issuance as of October 1, 1926, of First and Refunding Bonds, 5% Series, due 1956, in the principal amount of $18,000,000	$1,497,546.00
To Account 150, Capital Stock Discount, representing discount on capital stock	75,814.12

[1] Account 108.15, Common Utility Plant Acquisition Adjustments, a sub-account of Account 108, Other Utility Plant, is used for the purpose of identifying plant acquisition adjustments arising through acquisitions of properties of more than one utility department.

To Account 151, Capital Stock Expense, representing expenses associated with the issuance of capital stock	$254,442.06
To Account 146, Other Deferred Debits, and Account 271, Earned Surplus, in appropriate amounts, representing deferred franchise expenses erroneously capitalized as cost of plant	36,960.00
To Account 250, Reserve for Depreciation of Electric Plant, representing unrecorded retirements	874,904.04
To Account 271, Earned Surplus, or Account 270, Capital Surplus, if properly created for that purpose, representing write-ups and other erroneous charges in the Company's plant account	9,141,473.01
Total	$11,881,199.23

(j) In its supplemental report the staff recommends that the Company be required to submit a plan for the disposition of the $9,293,057.46, to be classified in Account 108.15.

The Commission *orders* that:

(A) At the public hearing to be held in the above-entitled matter, which hearing has been indefinitely postponed, the issues to be determined shall be those raised by the Commission's order of June 15, 1943, as supplemented by this order, and the Company's response to the order of June 15, 1943.

(B) The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts in the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected.

(C) The Secretary serve upon the Company a copy of the supplemental report herein referred

to concurrently with the service on the Company of this order.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit 8 to the complaint is as follows:

UNITED STATES OF AMERICA—FEDERAL POWER COMMISSION

Docket No. IT-5829

IN THE MATTER OF ARKANSAS POWER & LIGHT COMPANY

PETITION

Comes the Arkansas Power & Light Company, the respondent, and for its petition herein states:

1. The respondent is a corporation organized and doing business in, and under the laws of, the State of Arkansas. It now owns and operates facilities for the generation, transmission and distribution of electric energy; operates steam heat and natural gas distribution properties and owns, and leases to an operating subsidiary, street railway and motor bus transportation properties. It formerly owned and operated ice and water properties. All of the respondent's property, business and operations are now, and since its organization have been, located and carried on exclusively in the State of Arkansas.

2. The respondent is a public utility within the terms and provisions of Section 1 of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935. With the exceptions

hereinafter stated, all of the property and facilities of the respondent, its business transactions, activities, records and books of account, under the provisions of said Act 324, are exclusively subject to regulation and supervision by the Department of Public Utilities created and empowered by said Act 324. Said Department, since organization, has been actively as well as officially supervising and regulating the respondent.

3. The respondent is also a public utility within the meaning of Section 201 (e) of the Federal Power Act, approved August 26, 1935, and a definite and limited portion of respondent's electric facilities and properties, as provided in said Act and only to the extent so provided, are thereby subjected to the jurisdiction and powers of this Commission. The respondent also owns and operates two hydroelectric projects licensed under the Federal Water Power Act of 1920.

4. The Arkansas Department of Public Utilities, among other authority and powers, is specifically authorized and empowered to promulgate, and require the respondent and other utilities operating in the State to keep their books of account in accordance with, and to observe, a uniform system of accounts, as well as rules regulating accounting. Said Department has promulgated and adopted such a system of accounts, a copy of which is attached hereto as Exhibit A and made a part hereof to the same extent as if copied herein in full.

5. By order dated June 24, 1944, the Department has made a complete reclassification of respondent's plant account and has separately found and fixed the original cost of its electric,

gas, steam heat and transportation properties, the respective acquisition costs thereof and the excess of recorded over actual cost to the respondent or affiliated interests, and has directed the respondent to record in the proper and applicable accounts such amounts as would reflect the Department's findings, and has further directed the disposition of the several amounts required to be disposed of by the respondent. The entire and complete action of the said Department will more fully appear from a copy of its findings and order attached hereto as Exhibit B and made a part hereof to the same extent as if copied herein in full.

6. The respondent has complied with all the terms, conditions and provisions of said order of the Department with respect to its accounts and has recorded upon its books all of the entries thereby required to be made.

7. In aid of its limited and restricted jurisdiction over the facilities and transactions of the respondent and other electric public utilities, this Commission adopted a uniform system of accounts, a copy of which is on file with the Commission and is by reference attached hereto as Exhibit C and made a part hereof to the same extent as if copied herein in full.

8. The Arkansas System of Accounts now followed and observed by the respondent is substantially, if not exactly, the same as the system of accounts adopted by the Commission with reference to accounts, the numbers thereof, and directions as to debits and credits thereto.

9. This Commission directed the respondent to make and file a reclassification of its plant account

as of January 1, 1937. On June 3, 1940, the respondent filed such a report, a copy of which report is on file with the Commission and is by reference attached hereto as Exhibit D and made a part hereof to the same extent as if copied herein in full. Thereafter, the staff of the Commission made an audit and examination of the books, records and files of the respondent for the purpose of determining the accuracy of said report and filed what will be hereinafter designated as the original staff report, which report is on file with the Commission and is by reference attached hereto as Exhibit E and made a part hereof to the same extent as if copied herein in full. In this report the staff took exceptions to numerous amounts and items as classified by the respondent's report and also made recommendations as to the proper classification to be made of respondent's plant account and as to the several accounts to which various amounts should be debited and credited upon the books of the respondent.

10. Thereafter, this Commission issued an order in this matter requiring the respondent to show cause why the recommendations contained in said original staff report should not be confirmed and approved by the Commission. Said show cause order is on file with the Commission and is by reference attached hereto as Exhibit F and made a part hereof to the same extent as if copied herein in full. The respondent filed a response to said show cause order within the time allowed therefor, a copy of said response being on file with the Commission and being by reference attached hereto as Exhibit G and made a

part hereof to the same extent as if copied herein in full. Thereafter, and after the date of the Department's order (Exhibit B hereto), the staff of this Commission made a further audit and examination of respondent's records and accounts pertaining to its plant account and filed with the Commission a supplemental report by reference attached hereto as Exhibit H and made a part hereof to the same extent as if copied herein in full.

11. By said supplemental report (Exhibit H hereto), the staff of this Commission, in derogation of said order of the Arkansas Department of Public Utilities (Exhibit B hereto), recommends in substance and effect that the Commission ignore the order and determinations of said Department with respect to the reclassification of respondent's plant account, the amounts and items pertaining thereto, the debits and credits and the dispositions thereof, irrespective of whether the said amounts or items grew out of or pertained to non-electric facilities not subject to the jurisdiction of this Commission, to electric facilities not subject to the jurisdiction of this Commission, or to electric facilities subject to the jurisdiction of this Commission.

12. Upon the filing of said supplemental staff report, this Commission issued its order requiring the respondent to show cause why the recommendations contained in the said supplemental staff report should not be approved, further requiring the respondent to submit a plan for the disposition of amounts assigned by said staff to the adjustment accounts, and further requiring the respondent to set forth in its response any

amounts disposed of since December 31, 1936 recommended for classification by said supplemental staff report in Accounts 107 and 108.15, together with the manner in which such disposition was effected.

13. The said supplemental report (Exhibit H hereto) assigns to the sub-accounts of Account 100 as of January 1, 1937, $35,082,500 or $254,161 less than the amounts, excluding sub-account 100.5 and affiliated company fees, assigned to such sub-accounts of Account 100 by the order of the Department of Public Utilities which is Exhibit B hereto. The difference between the assignments made by said supplemental staff report (Exhibit H hereto) and said order of the Department (Exhibit B hereto) is less than 1% and could not appreciably affect the determination of reasonable rates either for respondent's over-all electric system or for the sale of electric energy at wholesale in interstate commerce.

14. By its findings and order (Exhibit B hereto), the Department of Public Utilities of Arkansas assigned to Accounts 100.5 and 108 the amount of $11,867,691.04 and to Account 107 $7,691,563.60 as of the same date.

15. By its said supplemental report (Exhibit H hereto), the staff of the Commission, ignoring the assignment made in its original staff report (Exhibit E hereto) of the amounts thereby assigned to Account 100.5, arbitrarily, and without authority contained in the Commission's uniform system of accounts, transferred from Account 100.5 the amount assigned thereto as aforesaid, and recommended that the same be charged to a new account (numbered 108.15) not provided for

by the Commission's system of accounts, and added to the amount so transferred a reputed difference between the original and actual cost of all of respondent's ice, water, transportation, steam heat and gas properties as of January 1, 1937, thereby incorporating in Account 108.15 an amount of $9,293,057.46 or $2,574,633.58 less than was assigned by the Arkansas Department to Accounts 100.5 and to 108, representing system cost in excess of original cost.

16. The Arkansas Department of Public Utilities, by its order (Exhibit B hereto), assigned to Account 107 as of January 1, 1937, $7,691,563.60, being the excess of recorded costs as reflected in the plant account of the respondent as of said date over the actual cost of the properties of the respondent or affiliated interests, and, after approving certain amounts which had been disposed of by the respondent and which were properly creditable to said Account 107, directed that the remainder thereof, as of December 31, 1943, be charged to earned surplus or capital surplus created for that purpose, all of which has been fully complied with by the respondent.

17. In addition to the amount assigned to Account 107 by the Arkansas Department of Public Utilities, the supplemental staff report recommends that an additional amount of $4,189,635.63 be charged to said account. This additional charge is fully explained and consists of the items, debit and credit, as shown on the statement attached hereto as Exhibit I and made a part hereof to the same extent as if copied herein in full.

18. The amounts assigned by the Department

of Public Utilities to Accounts 100.5 and 107 or by the Staff of the Commission to either of said accounts or to Account 108.15 and the disposition thereof can have no bearing upon or relation to the determination of reasonable rates for electric energy sold by the respondent at wholesale in interstate commerce for resale.

19. Any action, order or proceeding on the part of this Commission changing or attempting to change any amounts or items classified and assigned by the Department of Public Utilities to Accounts 100.5, 107 or 108, or to direct any disposition thereof contrary to the orders of said Department, would result in an irreconcilable conflict between State and Federal regulatory agencies and would be not only an invasion and usurpation of powers of the State of Arkansas reserved under the Tenth Amendment to the Federal Constitution, but would also be beyond the sanction of the commerce clause of Article V of the Federal Constitution.

20. The Department, by its order (Exhibit B hereto), fixed and established an actual cost rate base for the respondent's electric system, representing the prudent investment which had been made by the respondent at arm's-length in properties used and useful in the public service. The Department further provided that the accounts of respondent, as established pursuant to said order, should represent and reflect the rate base so found. That rate base would be disturbed and the order of the Department with respect to such rate base would be nullified if the accounts reflecting the respondent's arm's-length investment

in its electric properties should be changed at the instance of this Commission.

21. Many of the items and amounts dealt with by the Department in its order (Exhibit B hereto) arose out of transactions and out of acquisitions of property wholly unrelated directly, incidentally or otherwise, to any facilities then or now used in interstate commerce. Therefore, exclusive jurisdiction to consider and direct the establishment or adjustment of accounts pertaining to these facilities is in the State of Arkansas.

22. The Utility Act of Arkansas, Act 324 of 1935, subjects the respondent to a heavy penalty for failure to observe and comply with the provisions of said Act and the rules and regulations and order promulgated by the Arkansas Department thereunder. The respondent, with respect to said items or any of them, cannot at the instance of this Commission make any debits, credits or disposition thereof other than as directed and ordered by the Arkansas Department without incurring the penalties provided in said Act 324.

23. As shown by the supplemental staff report (Exhibit H hereto), many of the items dealt with by the Staff and the disposition of which the Commission proposes to direct, have been recognized by said Staff as pertaining to respondent's transportation plant, steam heat plant, and its formerly-owned ice and water properties. These items are clearly and wholly without the jurisdiction of this Commission.

24. The primary, fundamental and dominant books of account kept by the respondent are sub-

ject to the jurisdiction and supervision of the Arkansas Department, inasmuch as the respondent is an Arkansas corporation, and its business and property are principally and primarily intrastate and have no relation to or bearing upon interstate commerce. Inasmuch as the primary and dominant books of account of the respondent so required to be kept under the jurisdiction of the Arkansas Department are substantially, if not exactly, the same as those prescribed by this Commission, and since the keeping of such records and books according to the orders, rules and regulations of the Arkansas Department will completely present all information essential to the exercise of the powers of this Commission with respect to the regulation of any interstate commerce carried on by the respondent, the Congress may not, under the commerce clause, empower this Commission to direct what, if any, items should be entered and disposed of in any such primary and dominant accounts of the respondent. Therefore this Commission cannot lawfully exercise the power asserted or attempted to be exercised pursuant to its said show-cause orders.

25. However, if in the judgment of the Commission the records and accounts of the respondent kept as required by the Arkansas Department should not adequately serve the purposes of the Commission with respect to the matters over which it has jurisdiction, the respondent now offers to maintain supplemental records and accounts in such form and in such manner as will provide the Commission with all information necessary or appropriate for the purposes of the administration of the Federal Power Act.

26. The orders in this cause require the respondent, among other things, to submit a plan for eliminating from its books of account the amounts assigned by the supplemental staff report (Exhibit H hereto) to the so-called adjustment accounts. In submitting a plan for the disposition of the items so assigned, other than the dispositions already made pursuant to the Arkansas Department's order (Exhibit B hereto), the respondent would be proposing to violate the Arkansas Statute (Act 324 of 1935). Especially is this true since many of the items included in said accounts have no relation whatever to the acquisition of facilities used in, or to transactions pertaining to, interstate commerce and, further, since all of said items have been definitely considered, determined, classified and disposed of by the Arkansas Department and the respondent's accounts have been adjusted to reflect the Department's findings, among other things, with respect to respondent's electric rate base.

Wherefore, the respondent prays (1) that the show cause orders issued herein be cancelled, set aside and for naught held; (2) or that such orders and the recommendations of said supplemental staff report be so amended as to require the respondent, in its response, only to treat and deal with items, amounts and transactions arising out of its acquisition of facilities actually used and useful in interstate commerce and not to deal or treat with items solely involving ice, water, steam heat, transportation, local electric distribution and intrastate transmission properties; (3) that the Commission rule forthwith the respondent not be required to make any debit, credit, dis-

position or other accounting entry in derogation or in conflict with the order of the Arkansas Department dated June 24, 1944 which has already been complied with by the respondent; (4) that the issues and matters raised by this motion be set for an early hearing and for oral argument before the Commission en banc, and (5) that the time prescribed for responding to the Commission's show cause order of September 27, 1944 be extended for a reasonable time after this motion has been disposed of.

Respectfully submitted.

ARKANSAS POWER & LIGHT COMPANY,

[SEAL]

By [s] C. S. LYNCH,
Executive Vice President.

Attest:

[s] L. GARRETT,
Secretary.

BRIDGES, BRIDGES, YOUNG & GREGORY,
Post office address: Simmons National Building,
Pine Bluff, Arkansas.

HOUSE, MOSES & HOLMES,
Post office address: Boyle Building,
Little Rock, Arkansas.

REID & PRIEST,
Post office address: Two Rector Street,
New York 6, New York.
Its Attorneys.

STATE OF ARKANSAS,
County of Jefferson, ss:

C. S. Lynch, being first duly sworn, deposes and says: that he is the Executive Vice-President of

Arkansas Power & Light Company, respondent herein; that he has read the foregoing petition and knows the contents thereof; and that the same are true to the best of his knowledge and belief.

[SEAL] [s] C. S. LYNCH

Subscribed and sworn to before me this 20th day of November, 1944.

[s] L. E. LEAS,
Notary Public.

My Commission Expires Oct. 1, 1947.

EXHIBIT I

ARKANSAS POWER & LIGHT COMPANY

Comparison of Amounts Assigned to Account 107 by Department of Public Utilities in its Order of June 24, 1944 and by Staff of Federal Power Commission in its Supplemental Report dated September 26, 1944

Item	Amount per D. P. U.	Amount per F. P. C.	Increase F. P. C. over D. P. U.
Excess over System Cost—Nov. 24, 1926	$6,209,465.50	$6,191,980.97	($77,484.50)
Excess over System Cost—Frank A. Reid Property—1927	912.12	912.12	
Excess over System Cost—Vernon B. Walters Property—1929	5,550.50	5,550.50	
Excess over System Cost—Wilson Power & Light Company	50,299.06	50,299.06	
Unamortized Debt Discount and Expense—Arkansas Central Power Company	300,000.00	450,000.00	150,000.00
Retirement Adjustments	605,989.04	874,064.04	268,074.40
Discount on Capital Stock	75,814.12	75,814.12	
Capital Stock Expense	254,442.06	254,442.06	
Contingency Reserve	120,190.74		(120,190.74)
Dunning Coal Company Acquisition		255,941.55	255,941.55
Pinon Power Plant Acquisition		212,212.54	212,212.54
Dumas Acquisition		36,960.00	36,960.00
Caddo River Power & Irrigation Company		1,030,000.00	1,030,000.00
Interest on Future Development—Remmel Dam		248,987.19	248,987.19
Construction and Supervision Fee		788,105.73	788,105.73
Arkansas Central Power Company		1,414,920.35	1,414,920.35
Total	$7,661,862.80	$11,921,199.33	$4,189,695.63

Exhibit 9 to the complaint is as follows:

UNITED STATES OF AMERICA—FEDERAL POWER COMMISSION

Before Commissioners: Basil Manly, Chairman; Claude L. Draper, Leland Olds, John W. Scott and Nelson Lee Smith.

JANUARY 2, 1945.

Docket No. IT-5829

IN THE MATTER OF ARKANSAS POWER & LIGHT COMPANY

ORDER SETTING HEARING

Upon consideration of the reclassification and original cost studies of Electric Plant as at January 1, 1937, filed June 3, 1940, by Arkansas Power & Light Company; the Commission staff's report thereon served on the Company with the Commission's order of June 15, 1943, and the response thereto filed September 18, 1943, by the Company; the Commission staff's supplemental report served on the Company with the Commission's order of September 27, 1944, and the response thereto filed November 27, 1944, by the Company; and the Company's motion to dismiss filed November 20, 1944;

The Commission *finds* that:

It is appropriate to carry out the provisions of the Federal Power Act that a hearing be held in this matter as hereinafter provided;

The Commission *orders* that:

(A) A public hearing be held commencing February 20, 1945, at 10 a. m. (E. W. T.) in the

Commission's Hearing Room, 1800 Pennsylvania Avenue, N. W., Washington, D. C., respecting the matters involved and the issues arising out of the proceedings in this matter;

(B) At such hearing the burden of proof to justify and to support by satisfactory proof every accounting entry, made or proposed to be made, which is brought into issue by the proceedings in this matter, shall be upon Arkansas Power & Light Company;

(C) At such hearing Arkansas Power & Light Company shall submit and support by satisfactory evidence an appropriate plan or plans for the disposition of any and all amounts which may, upon determination of the issues in this matter, be required to be classified in Account 107, Electric Plant Adjustments, or in Account 108.15, Common Utility Plant Acquisition Adjustments.

By the Commission.

LEON M. FUQUAY,
Secretary.

APPENDIX D

The Commission's order of January 9, 1945 *In the Matter of Arkansas Power & Light Company*, Docket IT–5829, is as follows:

ORDER AMENDING ORDER OF JANUARY 2, 1945

It appearing that the Commission's order of January 2, 1945, in the first paragraph refers to "the Company's motion to dismiss filed November 20, 1944," whereas reference in that regard should have been to "the Company's petition to dismiss filed November 22, 1944";

It is *ordered* that:

The first paragraph of the Commission's order of January 2, 1945, be and it is hereby amended by striking the words "the Company's motion to dismiss filed November 20, 1944" and substituting therefor the words "the Company's petition to dismiss filed November 22, 1944."

U. S. GOVERNMENT PRINTING OFFICE: 1947